

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TED W. ROOKSTOOL and LEAH C.
ROOKSTOOL,

Petitioners,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,

Respondent.

3:06-CV-00499-LRH-VPC

ORDER

Presently before the court are cross-motions for summary judgment. Petitioners, Ted W. Rookstool and Leah C. Rookstool (collectively, “Petitioners”), filed a Motion for Summary Judgment (# 13¹) on May 18, 2007. On June 18, 2007, Respondent, United States Department of Agriculture (“USDA”), filed an opposition (# 14) and Cross-Motion for Summary Judgment (# 15). Petitioners subsequently filed a reply (# 16) to their Motion for Summary Judgment and an opposition (# 17) to USDA’s cross-motion. USDA replied (# 18).

I. Factual and Procedural Background

This is an action seeking judicial review of the final decision of the Director of the National Appeal Division of the USDA. On May 20, 1993, Petitioners entered into a Shared Appreciation

¹Refers to the court’s docket number.

1 Agreement (“SAA”) with the Farmers Home Administration. (Administrative Record (# 6), SAA
2 at 352.) A SAA is an agreement where USDA agrees to write-down a borrower’s debt and the
3 borrower is required to pay a portion of any appreciation that accrued on their farm during the term
4 of the SAA. *Id.*; *Pauly v. USDA*, 348 F.3d 1143, 1146 (9th Cir. 2003). Pursuant to the regulations,
5 the amount of appreciation is the difference between the value of the real property at the initiation
6 of the SAA and the value at the termination of the SAA after subtracting the “contributory value”
7 of qualifying capital improvements. 7 C.F.R. 1951.914(c). By its terms, the SAA in this case
8 expired on May 20, 2003. (Administrative Record (# 6), SAA at 352.)

9 On September 7, 2005, the Farm Service Agency (“FSA”), a USDA agency, wrote
10 Petitioners a letter informing them that shared appreciation recapture was due in the amount of
11 \$135,182. (Administrative Record (# 6), September 7, 2005, Letter at 4-5.) FSA relied on the
12 appraisal of Kenneth Brush in determining the current market value of the property.
13 (Administrative Record (# 6), Brush Appraisal at 143-264.)

14 Petitioners appealed the decision to the National Appeals Division (“NAD”).
15 (Administrative Record (# 6), October 3, 2005, Letter at 12.) Petitioners’ appeal was based on their
16 disagreement with the value FSA assigned to the farm at the end of the SAA and with the value
17 FSA claims they contributed to the farm with added capital improvements. (Administrative Record
18 (# 6), Hearing Officer Appeal Determination at 67.) At the NAD hearing, Petitioners presented a
19 Restricted Use Review Appraisal Report and a Market Value Summary Appraisal Report
20 conducted by Greg Ruddell. *See* (Administrative Record (# 6), Ruddell Appraisal at 389-518.)
21 Petitioners’ appraisal appraised the property at \$480,000. (Administrative Record (# 6), Hearing
22 Officer Appeal Determination at 69.) On March 23, 2006, a Hearing Officer issued his Appeal
23 Determination. (Administrative Record (# 6), Hearing Officer Appeal Determination at 73.) The
24 Hearing Officer concluded that Petitioners were permitted to use their own appraisal, and the
25 testimony of their appraiser, to challenge the appraised value of their property. *Id.* The Hearing
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1 Officer further concluded that a preponderance of evidence did not support the value attributed to
2 Petitioner's real property by FSA. *Id.*

3 On April 25, 2006, FSA requested a review of the hearing officer's decision by the Director
4 of the National Appeals Division. (Administrative Record (# 6), April 25, 2006, Memorandum at
5 73.) Upon review, the Director reversed the Hearing Officer's determination. (Administrative
6 Record (# 6), Director Review Determination at 109-17.) The Director found that the Hearing
7 Officer's conclusion that the Ruddell Appraisal met Uniform Standards of Professional Appraisal
8 Practice ("USPAP")² standards was not supported by the evidence because there was no
9 independent technical appraisal review. *Id.* at 111. The Director further found that since
10 Petitioners did not show that the Brush Appraisal was faulty, in that it was not compliant with the
11 USPAP, FSA properly determined the market value of the property and the value of the capital
12 improvements. *Id.* at 114. Petitioners subsequently filed this action for judicial review on
13 September 15, 2006.

14 **II. Legal Standard**

15 7 U.S.C. § 6999 provides for judicial review of a final determination of the National Appeal
16 Division. Review of such a decision is conducted in accordance with the Administrative Procedure
17 Act ("APA"), 5 U.S.C. §§701 et seq. 7 U.S.C. § 6999. Thus, this court will "hold unlawful and set
18 aside agency action, findings, and conclusions" that are found to be "arbitrary, capricious, an abuse
19 of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A). "An agency's
20 action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if
21 the agency offers an explanation for the decision that is contrary to the evidence, if the agency's
22 decision is so implausible that it could not be ascribed to a difference in view or be the product of
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24 ²USPAP are the "standards governing the preparation, reporting, and reviewing of appraisals
25 established by the Appraisal Foundation pursuant to the Financial Institutions Reform, Recovery, and
26 Enforcement Act of 1989." 7 C.F.R. § 761.7(b).

agency expertise, or if the agency's decision is contrary to governing law." *The Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (citations omitted). The party challenging agency action bears the burden of proof. *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986) (citing *Nat'l Ass'n of Regulatory Utility Comm'r v. F.C.C.*, 746 F.2d 1492, 1502 (D.C. Cir. 1984)). "Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action." *Southeast Alaska Conservation v. U.S. Army Corps of Engineers*, 486 F.3d 638, 654 (9th Cir. 2007) (citing 5 U.S.C. § 706(2)). "In other words, a court should 'vacate the agency's action and remand to the agency to act in compliance with its statutory obligations.'" *Id.* (quoting *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005)).

III. Discussion

In seeking judicial review, Petitioners argue that the role of the Director is to review the decision of the Hearing Officer to ensure that it is supported by substantial evidence. Thus, Petitioners argue that the Director exceeded his authority in several respects that will be addressed below. USDA, on the other hand, argues that the hearing officer had a limited role of determining whether FSA's calculation of shared appreciation was consistent with the laws and regulations of the agency. Under this standard of review, USDA argues that once the hearing officer acknowledged that the Brush appraisal complied with USPAP, the hearing officer should have concluded that FSA's calculation of shared appreciation was not erroneous.

A. The Authority of the Hearing Officer

In the interests of clarity, the court will first address USDA's argument that the Hearing Officer had a limited role of concluding that the FSA's appreciation calculation was not erroneous after finding that the Brush Appraisal complied with USPAP. Upon closely reviewing the administrative scheme and the record as a whole, the court disagrees with USDA's assessment of the Hearing Officer's role.

1 As an initial matter, USDA asserts that a technical appraisal review must be conducted by
2 an independent appraiser. The regulations do not support this assertion. Federal regulations have
3 been enacted that determine how to calculate the amount of shared appreciation due under a SAA.
4 *See* 7 C.F.R. § 1951.914(c). Section 1951.914(c) provides, “[t]he current market value of the real
5 estate security property will be determined based on a current appraisal in accordance with 7 C.F.R.
6 § 761.7” 7 C.F.R. § 1951.914(c). Section 761.7(c) provides as follows: “Real estate
7 appraisals, technical appraisal reviews of real estate appraisals, and their respective forms must
8 comply with the standards contained in USPAP, as well as applicable Agency regulations and
9 procedures for the specific Farm Loan Program activity involved.” 7 C.F.R. § 761.7(c). A
10 “technical appraisal review” is a “review of an appraisal to determine if such appraisal meets the
11 requirements of USPAP pursuant to standard 3 of USPAP.” 7 C.F.R. § 761.7(b).

12 Thus, the regulations define the term “technical appraisal review” but do not require that
13 such a review occur. *See* 7 C.F.R. § 761.7(b). Instead, the regulations merely require that the
14 appraisal comply with the standards contained in USPAP. 7 C.F.R. § 761.7(c). The parties have
15 not pointed to any regulation that provides a technical appraisal review is required to show that an
16 appraisal complies with USPAP. Furthermore, the parties have not cited to any specific portion of
17 USPAP which requires such a technical appraisal review. While a technical appraisal review may
18 establish that an appraisal complies with USPAP, there is no indication that a Hearing Officer is
19 incapable or unqualified to make such a determination. Without such a requirement, the only
20 proper issue before the Director was whether substantial evidence supported the Hearing Officer’s
21 decision. 7 C.F.R. § 11.10(d).

22 In addition, the court finds that USDA is incorrect in its view of the limited role of the
23 Hearing Officer. There is no provision in the regulations that limits the role of the Hearing Officer
24 in the manner suggested by USDA. Pursuant to the regulations, a party may appeal an adverse FSA
25 decision by requesting a hearing before a Hearing Officer. *See* 7 C.F.R. § 11.6(b). During the
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1 hearing, the parties may present evidence, oral testimony of witnesses, arguments in support of the
2 party's position, and may controvert evidence relied upon by the other party. 7 C.F.R. §
3 11.8(c)(5)(ii). "The appellant has the burden of proving that the adverse decision of the agency was
4 erroneous by a preponderance of the evidence." 7 C.F.R. § 11.8(e).

5 The regulations permit a party to appeal the decision of the Hearing Officer to the Director
6 of the National Appeals Division. 7 C.F.R. § 11.9. The Director reviews the determination of the
7 Hearing Officer to determine whether the decision is supported by substantial evidence. 7 C.F.R. §
8 11.10(d). "In making a determination on the appeal, Hearing Officers and the Director shall ensure
9 that the decision is consistent with the laws and regulations of the agency, and with the generally
10 applicable interpretations of such laws and regulations." 7 C.F.R. § 11.10(b).

11 No provision describing this review process indicates that the Hearing Officer is restricted
12 to determining whether the appraisal supplied by FSA complies with USPAP. To the contrary, the
13 express language of the regulations indicate that during such a hearing, the parties can present
14 evidence and argument to support their position. 7 C.F.R. § 11.8(c)(5)(ii). That is what happened
15 in this case. Petitioners presented a Restricted Use Review Appraisal Report and a Market Value
16 Summary Appraisal Report conducted by Greg Ruddell that the Hearing Officer found complied
17 with USPAP. Pursuant to the regulations, the Hearing Officer was obligated to consider such
18 evidence. *See id.*

19 In addition to erroneously arguing that the regulations support its position, USDA argues
20 that the FSA Handbook limits the issue before the Hearing Officer to whether the FSA's appraisal
21 is consistent with USPAP. The relevant portion of the FSA Handbook provides as follows:

22 If the appellant . . . chooses to challenge the appraisal obtained by FSA for any loan
23 making or loan servicing activities other than primary loan servicing under FSA
24 transferred Instruction 1951-S, the issue on appeal will be whether FSA's appraisal
is consistent with USPAP and the appellant may provide an independent technical
appraisal review of FSA's appraisal.

25 Note: The appellant does not have the right to provide a second independent
26 appraisal for consideration.

1 (Administrative Record (# 6), FSA Handbook excerpt at 348.)

2 It is undisputed that the FSA Handbook is properly characterized as a generally applicable
3 interpretation of the agency's regulations. The court ordinarily gives "substantial deference to an
4 agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504,
5 511 (1994). Nevertheless, the court need not defer to an unreasonable construction that does not
6 conform with the wording and purpose of the regulation. *Public Citizen Inc. v. Mineta*, 343 F.3d
7 1159, 1166 (9th Cir. 2003) (citations omitted).

8 In this case, the court finds that the portion of the FSA Handbook quoted above is an
9 unreasonable construction of the regulations. As previously addressed, the regulations explicitly
10 permit the parties to present evidence, oral testimony of witnesses, arguments in support of the
11 party's position, and controvert evidence relied upon by the other party. 7 C.F.R. § 11.8(c)(5)(ii).
12 The regulations do not limit the type of evidence that can be presented nor do they specify that the
13 FSA's appraisal is final unless it can be shown that it is not USPAP compliant.

14 After the presentation of evidence, the Hearing Officer must determine whether appellant
15 has proven, by a preponderance of the evidence, that the adverse decision of the agency was
16 erroneous." 7 C.F.R. § 11.8(e). On appeal to the Director, the only issues are whether the decision
17 of the Hearing Officer is supported by substantial evidence, 7 C.F.R. § 11.10(d), and whether the
18 decision is consistent with the laws and regulations of the agency, and with the generally applicable
19 interpretations of such laws and regulations, 7 C.F.R. § 11.10(b).

20 **B. Petitioners' Assertions of Error**

21 In seeking review, Petitioners argue that the Director exceeded his limited review authority
22 in several respects. USDA does directly respond to each alleged error. The court will address each
23 alleged error below.

24 First, Petitioners argue that the Director erred by concluding that the standard of proof was a
25 preponderance of the evidence. In addressing the applicable legal standards, the Director's
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1 determination does state that “Appellants have the burden of proving that the adverse decision of
2 the agency was erroneous by a preponderance of the evidence.” (Administrative Record (# 6),
3 Director Review Determination at 110.) Petitioners are correct that the preponderance standard is
4 the standard used before the hearing officer, 7 C.F.R. § 11.8(e), and that the Director reviews the
5 decision for substantial evidence, 7 C.F.R. § 11.10(d). Nevertheless, it is unclear to this court
6 whether the Director actually used the preponderance standard. In reviewing the Hearing Officer’s
7 findings of fact, the Director found that several findings were supported by substantial evidence.
8 (Administrative Record (# 6), Director Review Determination at 110.) Thus, it is not clear to this
9 court whether the Director committed error. Thus, on remand, the Director will be instructed to
10 review the evidence based on the substantial evidence standard.

11 Second, Petitioners argue that the Director erred in finding that the Ruddell Appraisal did
12 not comply with USPAP because there was no independent technical appraisal review. As
13 previously discussed, there is no regulation that requires an independent technical appraisal review.
14 Thus, the court finds the Director erred in concluding that a technical appraisal review is required
15 to determine whether an appraisal is USPAP compliant. The proper role of the Director was to
16 determine whether there was substantial evidence, apart from the lack of an independent technical
17 appraisal review, to support the Hearing Officer’s conclusion that the appraisal was USPAP
18 compliant.

19 Third,³ Petitioners argue that the Director erred when concluding that the Hearing Officer
20 incorrectly found that it was his duty to consider the experts’ opinions and determine which of the
21 two appraisals was supported by a preponderance of the evidence. The court agrees with
22 Petitioners. The Director’s determination states that the Hearing Officer’s only function is to
23 determine whether FSA’s decision was consistent with the regulations. (Administrative Record (#
24 6), Director Review Determination at 115.)

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26 ³Petitioners’ fourth argument is repetitive of the third and will not be addressed separately.

1 As previously discussed by the court, the Hearing Officer is responsible for determining
2 whether the adverse decision of the agency was erroneous by a preponderance of the evidence. 7
3 C.F.R. § 11.8(e). In making that determination, the Hearing Officer must ensure that the decision is
4 consistent with the laws and regulations of the agency. 7 C.F.R. § 11.10(b). However, the
5 regulations permit parties to present evidence, oral testimony of witnesses, arguments in support of
6 the party's position, and to controvert evidence relied upon by the other party. 7 C.F.R. §
7 11.8(c)(5)(ii). In light of this statutory structure, conflicting evidence will likely be presented
8 before a Hearing Officer. Under such circumstances, the Hearing Officer must examine all the
9 evidence to determine whether the adverse decision of the agency was erroneous by a
10 preponderance of the evidence. *See* 7 C.F.R. § 11.8(e). In light of the Hearing Officer's role, it is
11 appropriate for the Hearing Officer to determine which appraisal to accept or reject. In reviewing
12 that decision, the Director is limited to determine whether substantial evidence supported the
13 Hearing Officer's decision. 7 C.F.R. § 11.10(d)

14 Petitioners' fifth and sixth arguments contend that the Director erred in stating that the
15 focus of the Hearing Officer's analysis should have been on whether the Brush Appraisal satisfied
16 USPAP requirements. Petitioners are correct. The appropriate role of the Hearing Officer was
17 previously set forth by the court in part III(A) above.

18 Next, Petitioners argue that the Director erred in finding irrelevant the fact that the FSA
19 included forgiveness of a debt in its consideration of a pending sale. In concluding that the
20 preponderance of the evidence does not support the value attributed to Petitioners' property by
21 FSA, the Hearing Officer found that the Brush Appraisal erroneously determined that the Pending
22 Sale offer included a forgiveness of debt. (Administrative Record (# 6), Hearing Officer Appeal
23 Determination at 73.) The Hearing Officer noted that the Pending Sale offer was included as a
24 verification of FSA's appraised value of Appellants' farm rather than as a comparable sale. *Id.* at
25 74. The Director found the Hearing Officer's assignment of error was irrelevant because the Brush
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1 appraisal did not consider the value of that sale in determining market value. (Administrative
2 Record (# 6), Director Review Determination at 116.)

3 The court finds no error in this portion of the Director's decision. Petitioners argue that a
4 comparable sale may be admissible as substantive proof of value of the property or as support for
5 the opinion of the expert. Here, the director did not conclude otherwise. The Director merely
6 found the Pending Sale offer was not used to determine the value of the property in the Brush
7 appraisal. The issue of whether the Brush Appraisal was flawed by using the Pending Sale offer as
8 a verification after the appraiser determined that sale included a forgiveness of debt is not before
9 the court.

10 The next alleged error relates to the value of a 79.3 acre tract of land. The Director
11 concluded that the Hearing Officer substituted his judgment for that of the appraisers in concluding
12 that the Brush appraisal valuation of the 79.3 acres was too high. Petitioners argue that the Director
13 erred because the Hearing Officer is responsible for making his own determination based on the
14 evidence presented.

15 In light of the previous errors found by the court, it is unclear to the court whether error was
16 committed. As discussed, the appropriate role of the Director was to determine whether substantial
17 evidence supported the Hearing Officer's determination. 7 C.F.R. § 11.10(d). By concluding that
18 the Hearing Officer substituted his judgment for that of the appraisers, the Director may have found
19 that substantial evidence did not support the Hearing Officer's conclusion. Thus, on remand, the
20 Director should clarify whether his decision was based on the appropriate standard of review and
21 determine whether substantial evidence supports the Hearing Officer's decision.

22 Petitioners next argue that the Director erred with respect to his decision regarding the
23 itemization of each capital improvement. The Hearing Officer found that the Brush Appraisal was
24 flawed because it itemized the value of each capital improvement. (Administrative Record (# 6),
25 Hearing Officer Appeal Determination at 75.) The Hearing Officer stated that the method used
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1 “limits itself to the consideration of a single, highly subjective method of determining the
2 contributory value of qualifying capital improvements, and failed to explore the possibility of other,
3 less subjective, and therefore possibly more accurate, methods.” *Id.* at 76. The Director disagreed
4 with the Hearing Officer and found that FSA’s interpretation of section 1951.914(c) was
5 reasonable. (Administrative Record (# 6), Director Review Determination at 116.)

6 In this case, the court finds that the decision of the Director is unclear. As this court has
7 stated several times, the role of the Director was to determine whether substantial evidence
8 supported the Hearing Officer’s determination, 7 C.F.R. § 11.10(d), and to ensure that the decision
9 of the agency is consistent with the laws and regulations of the agency, and with the generally
10 applicable interpretations of such laws and regulations, 7 C.F.R. § 11.10(b).

11 Here, the Director did not identify any generally applicable interpretation of Section
12 1951.914(c)(ii). Furthermore, it is not clear whether the Director interpreted the requirements of
13 Section 1951.914(c)(ii) himself. In his determination, the Director first states that the FSA’s
14 interpretation of the regulation is reasonable. (Administrative Record (# 6), Director Review
15 Determination at 116.) Thus, it is possible the Director neglected his duty to determine whether the
16 decision is consistent with the regulations as the Director may not have interpreted the meaning of
17 the regulation in the first instance.

18 The Director’s determination continues by stating that the Director found the FSA’s
19 calculation of the total contributory value of the capital improvements to be proper and consistent
20 with the regulations. *Id.* at 116-17. However, the Director offers little explanation for this
21 conclusory finding as he merely states that the Brush appraisal provided a sound basis for the value
22 he used for the contributory value of the capital improvements. *Id.* Because the Director’s
23 determination is unclear, the court will direct the Director to clarify his decision on remand. If the
24 Director concludes that Section 1915.914(c)(ii) neither requires nor prohibits such itemization, then
25 the Director must review the Hearing Officer’s determination for substantial evidence. Because it
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1 is unclear whether the agency has interpreted Section 1951.915(c)(ii), the court will remand the
2 action to the agency to first interpret and apply the regulation.

3 Petitioners' final argument asserts that the Director erred in concluding that Petitioners did
4 not show by a preponderance of the evidence that FSA's decision was erroneous. This court
5 agrees. The role of the Director was to determine whether substantial evidence supported the
6 Hearing Officer's determination, 7 C.F.R. § 11.10(d), and to ensure that the decision of the agency
7 is consistent with the laws and regulations of the agency, and with the generally applicable
8 interpretations of such laws and regulations, 7 C.F.R. § 11.10(b). Thus, it is clear that the Director
9 did not review the decision of the Hearing Officer in accordance with the law.

10 In light of the foregoing discussion, the court finds that the decision of the Director is
11 arbitrary, capricious, and contrary to law. Because the Director did not review the Hearing
12 Officer's decision in accordance with the law and regulations, the court will remand this action for
13 further consideration in light of this order.

14 IT IS THEREFORE ORDERED that Petitioners' Motion for Summary Judgment (# 13) is
15 hereby GRANTED. The Director's determination is hereby REVERSED and REMANDED for
16 reconsideration and clarification consistent with this order.

17 IT IS FURTHER ORDERED that USDA's Cross-Motion for Summary Judgment (# 15) is
18 hereby DENIED.

19 The Clerk of the court shall enter judgment accordingly.

20 IT IS SO ORDERED.

21 DATED this 14th day of February, 2008.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE